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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

425 Eye Street N.W.

BCIS, AAO, 20 Mass, 3/F

Washington, D.C. 20536

File: WAC 01 277,57737

Office: CALIFORNIA SERVICE CENTER Date:

MAY 16 2003

IN RE: Petitioner:

Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an architectural, engineering, urban planning, and construction administration firm. It seeks to employ the beneficiary permanently in the United States as an architect. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is January 13, 1998. The beneficiary's salary as stated on the labor certification is \$30.53 per hour or \$63,502.40 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for

evidence (RFE) dated December 19, 2001, the director required federal tax returns, annual reports, or audited financial statements and Forms W-2 and W-3 to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, as well as Forms DE-6 for the last four (4) quarters.

Counsel submitted in response only the petitioner's 1998 Form 1120, U.S. Corporation Income Tax Return. It reflected a deficit of taxable income before net operating loss deduction and special deductions, (\$1,576), less than the proffered wage. Net current assets, by definition the difference of current assets minus current liabilities, were (\$37,475), also a deficit and less than the proffered wage. Counsel offered the beneficiary's earnings statements from October 1996 to April 1999, for times before the priority date and in amounts less than the proffered wage.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel submits the petitioner's 1999-2001 Forms 1120, U.S. Corporation Income Tax Returns. Counsel now furnishes Forms W-2 of the beneficiary to show wage payments to him of \$49,680 in 1998, \$49,830 in 1999, and \$38,925 in 2000, all less than the proffered wage. The 1999-2001 tax returns still show deficits of taxable income before net operating loss deduction and special deductions, (\$446), (\$2,960), and (\$3,216), less than the proffered wage. Unabated deficits persist, also, in net current assets.

Counsel instructs on appeal:

1. The California Service Center should have more appropriately focused on or considered the Petitioner's total assets, gross income, total income, and salaries paid, as reflected in the federal tax returns, which clearly evidence the petitioner's ability to pay. Instead, the [Bureau, formerly the Service] focused on net income, which is merely a function of proper tax planning, and cannot be a true indicator of a petitioner's ability to pay.

Counsel offers no authority for this point. In determining the petitioner's ability to pay the proffered wage, the Bureau will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered

wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Bureau had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

Counsel contends that the compensation of officers, from 1998 to 2001, should be combined with the salaries and wages which petitioner has paid. Together, the resulting sums are said to establish the ability to pay the proffered wage. These payments count again those reported on the beneficiary's W-2 Forms.

Counsel has not advised that the beneficiary will replace any workers. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

Counsel concedes the failure of evidence on the tax returns, but, nonetheless, contends:

3. Despite the Petitioner's tax returns, the Beneficiary's employment clearly evidences the Petitioner's ability to pay.

The RFE requested Forms W-2 in accord with 8 C.F.R. § 204.5(g)(2). Counsel stipulates that the petitioner employed the beneficiary since 1993. Still, counsel withheld even the beneficiary's Forms W-2 in response to the RFE, offering them as exhibits 10-12 on appeal. The AAO has considered them, though not required.

Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the Bureau. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Notwithstanding the petitioner's own omissions in the presentation of evidence, counsel contends:

2. The petitioner offered to submit further documentation if the [Bureau] believed that the submitted evidence was deficient. The [Bureau] should have allowed the Petitioner to submit further documentation in order to cure the perceived defect, rather than completely ignoring or disregarding the offer.

The regulations for the processing of petitions and evidence appear in 8 C.F.R. §§ 103.2(b)(1)-(19). They establish the time to produce evidence, and after it has passed, extensions are not authorized. 8 C.F.R. § 103.2(b)(8). For example, the service center received counsel's response to the RFE, by mail, on the penultimate day of the mail receipt date. This regulation allows time for the petitioner to make complete submissions, but negates extensions. No part of the total regulations accommodates an open program to cure defects, however perceived.

After a review of the federal tax returns, Forms W-2, and earnings statements, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.